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ALSO PRESENT: John Doe, Plaintiff

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Donica Varner, Oberlin General Counsel

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Rebecca Mosely, Oberlin Title IX Coordinator

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09:18:44 1 (9:18 a.m., via teleconference)

09:18:46 2 THE COURT: All right. Thank you, everyone.

09:18:48 3 This is a telephone conference in Doe vs. Oberlin College,

09:18:53 4 et al. It's Case Number 1:20-cv-669.

09:18:58 5 There was a motion that was file --

6 [Reporter interjection.]

09:20:01 7 [Off-the-record discussion.]

09:20:01 8 THE COURT: Well, now I can't see the case

09:20:04 9 numbers, so you'll have to get that.

09:20:09 10 Plaintiffs filed a motion for reconsideration after
09:20:14 11 the Court had already denied the motion for TRO, and I was
09:20:21 12 going to follow it up with an opinion. So I thought I ought
09:20:22 13 to talk to maybe -- the plaintiff is concerned that the
09:20:33 14 language is pretty vague as to the format of the hearing,
09:20:36 15 particularly under the circumstances now where not only is
09:20:41 16 the campus closed, but it's very difficult to get people
09:20:46 17 together and will be for some time.

09:20:48 18 I think I'd like to find out from defendant how you
09:20:55 19 plan to conduct the investigation and what type of hearing
09:20:58 20 do you contemplate.

09:21:01 21 MR. WALLACE: Okay. Your Honor, this is Dave
09:21:04 22 Wallace for Oberlin. Can you hear me okay?

09:21:07 23 THE COURT: Yes.

09:21:08 24 MR. WALLACE: The first thing I would say is I
09:21:11 25 have no idea whether there would ever be a hearing because

09:21:13 1 we are simply in the investigatory stage, simply trying to
09:21:18 2 conduct an investigation after which the Title IX team will
09:21:23 3 make an assessment and determine whether there is -- whether
09:21:26 4 it should proceed to a hearing or not. So that's the first
09:21:30 5 point.

09:21:30 6 Second of all, the concern they've expressed about
09:21:35 7 this alternative adjudication, we have -- although we
09:21:39 8 certainly have that right under the policy, in this era of
09:21:43 9 modern technology, we don't see a problem with having a
09:21:46 10 hearing if one is necessary. It might not be in person, it
09:21:55 11 might have to be, you know, a Zoom or something like that.
09:21:58 12 But we have no intention of having one person decide this if
09:22:01 13 it is ever decided to go to hearing.

09:22:03 14 The other point that I'd like to raise at this time,
09:22:06 15 Judge, is their whole motion is predicated on the idea that
09:22:10 16 there is -- that there is some lack of due process here.
09:22:16 17 And I think it's important that we get it straight out of
09:22:20 18 the chute that Oberlin as a private college is not a state
09:22:24 19 actor, and it is not subject to due process requirements.

09:22:27 20 Now, we want to be fair, of course, and our policy
09:22:30 21 meets all the OCR guidelines to be fair, but there is no
09:22:34 22 claim for due process that can be made against Oberlin. The
09:22:38 23 Sixth Circuit has recognized that and the Northern District
09:22:41 24 has recognized that and courts all over the country have
09:22:43 25 recognized that you cannot bring a due process claim against

09:22:47 1 a private college or university. So their reliance on this
09:22:54 2 case out of Michigan which pertains to a public university
09:22:57 3 is wholly out of, frankly, left field.

09:23:03 4 THE COURT: All right. Well, that's a good
09:23:05 5 point. The defendant raised that last time, that Oberlin is
09:23:11 6 a private college so they are not a state actor.

09:23:16 7 Do plaintiffs have any response to that?

09:23:23 8 MR. MURRAY: Your Honor, this is Brian Murray
09:23:24 9 on behalf of the plaintiff.

09:23:26 10 I believe that -- and we can, you know, brief this
09:23:30 11 issue if the Court permits us. They receive federal funding
09:23:36 12 and they receive state funding, so I would believe that
09:23:41 13 there's an argument to be made that even though they're a
09:23:44 14 private college, that they would be considered a state actor
09:23:48 15 because of the funding that they receive.

09:23:51 16 MR. WALLACE: Well -- I'm sorry, are you done?

09:23:52 17 I would just respond by saying Judge Nugent has
09:23:56 18 already rejected that very argument. I can provide you with
09:23:58 19 a citation if you're interested. It's --

09:24:01 20 THE COURT: Yeah, that -- I think that's
09:24:03 21 not --

09:24:48 22 [Reporter interjection.]

09:24:48 23 (Off-the-record discussion.)

09:25:57 24 THE COURT: I don't think that the state
09:26:01 25 funding or federal funding is going to carry the day, so I

09:26:07 1 think that's an important argument.

09:26:09 2 But the process still has to be fair, so -- so what
09:26:17 3 Oberlin is representing is that if a -- number one, they
09:26:23 4 haven't decided if they need a hearing, all right? It may
09:26:26 5 not get past the investigation stage, all right? And if
09:26:29 6 there is going to be a hearing and the COVID-19 epidemic is
09:26:38 7 still requiring sheltering, distancing, et cetera, they'll
09:26:44 8 conduct the hearing remotely using technology.

09:26:46 9 Is that correct, David?

09:26:52 10 MR. WALLACE: I think that's a fair statement,
09:26:54 11 Your Honor.

09:26:54 12 THE COURT: All right. We're doing things --
09:26:56 13 using Zoom videoconferencing in Federal Court even for
09:26:59 14 criminal matters when necessary. So while it's better to
09:27:04 15 have people in person, if you can't, you can certainly do it
09:27:06 16 that way. So I think that satisfies any concerns.

09:27:11 17 Now, what -- what can -- if the complainant -- you
09:27:26 18 can't compel either the complainant or the plaintiff here to
09:27:29 19 appear and testify. You can request them to, but they can
09:27:33 20 choose not to. So if there is a hearing, will the hearing
09:27:43 21 officer request that both the complainant and the plaintiff,
09:27:50 22 Mr. Doe, appear?

09:27:53 23 MR. WALLACE: I don't know the answer to that.
09:27:56 24 Perhaps our Title IX coordinator who is on the line could
09:27:59 25 better answer that than me, Your Honor.

09:28:01 1 THE COURT: That's Ms. Mosely?

09:28:03 2 MR. WALLACE: That's correct.

09:28:04 3 THE COURT: Ms. Mosely, if -- again, there may
09:28:09 4 not be a hearing. If the university decides to drop it,
09:28:12 5 they drop it. But if there is a hearing, whether you do it
09:28:14 6 in person or using technology, do you plan to request both
09:28:19 7 the complainant and the plaintiff here, Mr. Doe, to appear?

09:28:24 8 MS. MOSELY: Yeah, this is Rebecca Mosely.

09:28:26 9 And absolutely, we would request that both would appear.

09:28:31 10 THE COURT: Okay. And obviously you don't
09:28:35 11 have subpoena power like I do. You can't force them to
09:28:39 12 appear. If they don't appear, you're free to draw whatever
09:28:44 13 adverse conclusions you wish. Or if they appear and don't
09:28:49 14 answer questions, it's not a criminal case so you're free to
09:28:52 15 draw any adverse inference you want. Is that correct?

09:28:58 16 MS. MOSELY: That is correct.

09:29:00 17 THE COURT: Okay. All right. Well, it seems
09:29:02 18 to me the plaintiffs -- even if Oberlin were a state actor,
09:29:07 19 that sounds like a fair proceeding to me.

09:29:10 20 Do you have a problem with that, with what Ms. Mosely
09:29:14 21 has outlined?

09:29:17 22 MR. MURRAY: Your Honor, it's Brian Murray
09:29:19 23 again for the plaintiff.

09:29:20 24 I would have a problem with that because the question
09:29:23 25 becomes how does the hearing happen if the reporting party

09:29:28 1 is not there. What evidence gets submitted? Is her
09:29:37 2 statement read into the record? Because our client,
09:29:41 3 according to Sixth Circuit case law, in order for it to be a
09:29:43 4 fair proceeding, has to have the opportunity to
09:29:46 5 cross-examine --

09:29:47 6 THE COURT: Well, that's if there's -- due
09:29:50 7 process applies, and I don't think it does because Oberlin
09:29:53 8 is a private actor. But, you know, you can attack it. It's
09:29:58 9 not worth much if the person doesn't appear, all right? The
09:30:01 10 same way if your client has given a written statement and
09:30:04 11 then chooses not to come to the hearing, all right?
09:30:08 12 Ms. Mosely can consider his written statement, but it's not
09:30:11 13 worth nearly as much as if he were -- appeared at a hearing
09:30:16 14 and was subject to cross-examination.

09:30:22 15 MR. MURRAY: Your Honor, this is Brian Murray
09:30:24 16 again.

09:30:25 17 On that point, I think we as lawyers would all agree
09:30:27 18 with that, but when we look at these cases that have, you
09:30:31 19 know, gone off to the Sixth Circuit like the Doe vs.
09:30:35 20 Cincinnati case I cited in the brief, in that case the
09:30:39 21 reporting party did not appear. The responding party did
09:30:44 22 and asserted it was consensual sex that they had engaged in.
09:30:49 23 And nevertheless, despite her -- the reporting party's
09:30:52 24 failure to appear, the panel still found that he violated
09:30:56 25 the policy.

09:30:57 1 And that type of situation has been happening all
09:31:05 2 across the country, and that's what's led to a lot of the
09:31:08 3 litigation involving these types of cases in the federal
09:31:10 4 courts, is that these reporting parties haven't been
09:31:14 5 required to appear, haven't had to have been questioned.
09:31:19 6 And it's been a process like what Oberlin's griped about
09:31:25 7 where there's a 100 percent conviction rate when they go to
09:31:30 8 a full hearing.

09:31:30 9 MR. WALLACE: Well, this is Dave Wallace. And
09:31:32 10 I would just say on yet another due process case cited by
09:31:35 11 plaintiff, we have to get away from the jurisprudence that
09:31:40 12 relates to due process because it does not apply here.

09:31:45 13 Our policy meets OCR guidelines. And so here we are,
09:31:53 14 we've got the first claim is for violations of due process.
09:31:58 15 Not applicable. Their next claim is for violations of Title
09:32:02 16 IX. Can't be an erroneous outcome yet because there hasn't
09:32:07 17 been an outcome.

09:32:07 18 So really this whole litigation has been an effort to
09:32:10 19 shut down our investigation and put the cart before the
09:32:14 20 horse. This process needs to play out, and it needs to play
09:32:17 21 out in accordance with our policy. And it may well be when
09:32:23 22 it's over, you know, there's a determination that there's no
09:32:27 23 responsibility.

09:32:29 24 THE COURT: All right. Look, I'm satisfied
09:32:32 25 that -- I don't believe there's a viable federal claim at

09:32:38 1 present. Due process doesn't apply to a private actor. Any
09:32:43 2 Title IX allegations are premature because the process is
09:32:48 3 just beginning. You can't have a conjectural case. No
09:32:53 4 one's done anything wrong. In fact, they're required under
09:32:57 5 Title IX to -- this obviously has to comport with it, but
09:33:03 6 it's hardly started.

09:33:05 7 So I'm denying the motion for TRO, and I'm dismissing
09:33:09 8 the federal claims.

09:33:10 9 Now, there are some state claims. I'll send those
09:33:17 10 to -- was this removed or was it originally filed here?

09:33:20 11 MR. WALLACE: It was removed, Your Honor.
09:33:23 12 Dave Wallace. Sorry.

09:33:24 13 THE COURT: I'll remand the state claims to
09:33:26 14 state court.

09:33:30 15 You know, I'll also indicate I'm satisfied that the
09:33:33 16 procedure that Oberlin has outlined seems fair to me.
09:33:40 17 Again, Oberlin can't compel anyone to appear. They can
09:33:43 18 request it and they can direct both the complainant and the
09:33:49 19 plaintiff here, Mr. Doe, to appear and answer questions. If
09:33:56 20 they refuse, they can't be compelled. Adverse inferences
09:34:00 21 can be drawn. If they've given statements, they can --
09:34:04 22 statements can be considered, but obviously they're not
09:34:09 23 worth nearly as much because the person didn't appear. If
09:34:15 24 one person appears and the other person doesn't, well,
09:34:18 25 inferences can be drawn there too.

09:34:20 1 But in any event, the federal claims, one, it doesn't
09:34:26 2 apply as Oberlin's a private actor, and, second, it's
09:34:30 3 premature, so that one -- I guess that's not binding at all,
09:34:36 4 it's premature.

09:34:38 5 MR. MURRAY: Your Honor --

09:34:39 6 THE COURT: If they want to proceed in state
09:34:41 7 court, then -- in front of a state judge, he or she can
09:34:44 8 decide what to do with them.

09:34:48 9 MR. MURRAY: Your Honor, this is Brian Murray
09:34:49 10 on behalf of the plaintiff again.

09:34:50 11 THE COURT: Yes.

09:34:51 12 MR. MURRAY: As to the Title IX claim, part of
09:34:56 13 the erroneous outcome was that the university switched after
09:35:01 14 they had agreed to the informal resolution, as was agreed to
09:35:07 15 by all the parties, to the formal resolution. It wasn't
09:35:11 16 just based upon an erroneous outcome after --

09:35:13 17 THE COURT: I don't recognize it as a --

18 [Reporter interjection.]

09:35:26 19 THE COURT: -- a viable claim. If you want to
09:35:27 20 raise that later at the end of the -- you know, if there's
09:35:31 21 some adverse finding against your client, you can raise
09:35:34 22 that, that that's a violation of Title IX. But the Title
09:35:39 23 IX, you've got to wait until it plays out. I'm just denying
09:35:46 24 the Title IX claims without prejudice. They're premature.

09:35:55 25 Anything else anyone wanted to say?

09:36:01 1 MR. WALLACE: Yes, Your Honor. This is Dave
09:36:02 2 Wallace again. And this may not be a popular point to make,
09:36:06 3 but I should point out that they have filed an amended
09:36:11 4 complaint, the amended complaint leave to file that was
09:36:16 5 granted this morning. In the amended complaint they plead I
09:36:21 6 believe diversity jurisdiction, which would -- and again, I
09:36:25 7 recognize this may not be a popular point to make -- which
09:36:30 8 would mean the state law claims I don't think could be
09:36:34 9 remanded. Sorry.

09:36:38 10 THE COURT: Well, I'll deny them without
09:36:40 11 prejudice. They are premature.

09:36:41 12 What are the state claims?

09:36:46 13 MR. MURRAY: Your Honor, this is Brian Murray.
09:36:48 14 The state law claims, there's a breach of contract
09:36:51 15 claim, there's a promissory estoppel claim that relate back
09:36:59 16 to the decision by the university in February to switch --
09:37:08 17 we believe there's a contract entered into as it relates to
09:37:10 18 the decision to go through the informal resolution process,
09:37:14 19 and that was a contract and that they breached that contract
09:37:18 20 by then changing course and taking it to a formal process
09:37:23 21 after all the parties had agreed to the informal resolution.

09:37:28 22 There are a state law negligence claim based upon how
09:37:32 23 they handled their investigation, the loss --

09:37:35 24 THE COURT: I find all of these premature.
09:37:37 25 I'm going to let this play out. Whatever happens, happens.

09:37:41 1 It may all be moot. Title IX directs the university to
09:37:48 2 conduct this investigation, so I'm just denying all those
09:37:51 3 state claims, and the specific case is premature. I'll let
09:37:57 4 it play out how it plays out. If someone feels aggrieved at
09:38:01 5 the end, obviously Mr. Doe can pursue whatever claims he
09:38:06 6 has.

09:38:07 7 I'm not going to jump into the middle of a mandated
09:38:11 8 Title IX investigation to deal with the state claims.
09:38:23 9 Because technically there is diversity jurisdiction, so I
09:38:26 10 think that's right, Mr. Wallace, so that's how I'm dealing
09:38:34 11 with these.

09:38:34 12 Okay. Anything else anyone wants to say?

09:38:38 13 Okay. I appreciate everyone's appearance this
09:38:40 14 morning.

09:38:42 15 (Proceedings adjourned at 9:38 a.m.)

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17 C E R T I F I C A T E

18
19 I certify that the foregoing is a correct transcript
20 of the record of proceedings in the above-entitled matter
21 prepared from my stenotype notes.

22

23 /s/ Lance A. Boardman 05-26-2020
24 Lance A. Boardman, RDR, CRR DATE
25